No. 79-2006

In the Supreme Court of the United States

OCTOBER TERM, 1979

LLOYD BARRENTINE, ET AL., PETITIONERS

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employee's submission of a contractual claim to a grievance committee precludes the employee from bringing an action under the Fair Labor Standards Act based on the same events.

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INTEREST OF THE UNITED STATES

The Secretary of Labor is authorized to enforce the provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq.*, by means of suits for injunctive relief and damages. 29 U.S.C. 216(c), 217. As an alternative to enforcement by the Secretary, Congress provided for private actions to be brought by "affected" employees in any federal or state court of competent jurisdiction. 29 U.S.C. 216(b). Private FLSA plaintiffs may recover back wages, liquidated damages, costs and reasonable attorney's fees. *Ibid.* Because the Secretary cannot oversee the pay practices of every employer, he depends in substantial measure on the enforcement efforts of private parties. Any restriction on the ability of private parties fully to pursue their statutory rights thus has a significant negative impact on the enforcement of the Act.

The court of appeals' decision in this case weakens the private enforcement provisions of the Act by barring private FLSA actions by employees who have submitted a collective bargaining agreement claim based on the same facts to a grievance committee. As happened in the present case, such a refusal to entertain an FLSA claim may result in the retention of a pay practice that is an apparent violation of the Act. The United States therefore has a substantial interest in the question presented by the petition.

STATEMENT

1. Respondent Arkansas-Best Freight Systems (ABF) does not pay its drivers for the time they spend checking their vehicles for violations of Department of Transportation safety regulations and driving them to a repair

facility in those instances in which violations are found.[1] Since both lower courts found that those actions are taken in the interest of ABF (Pet. App. 4a, 21a), the time spent on them is apparently compensable under the FLSA. See *Dunlop* v. *City Electric, Inc.*, 527 F. 2d 394, 398-399 (5th Cir. 1976); *Mitchell* v. *Mitchell Truck Line, Inc.*, 286 F. 2d 721, 725 (5th Cir. 1961); *Mitchell* v. *Stewart Brothers Construction Co.*, 184 F. Supp. 886, 895 (D. Neb. 1960).

This time is also apparently compensable under the collective bargaining agreement that was in force between ABF and respondent Local 878 of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen. Article 50 of that agreement required ABF to pay its employees "for all time worked by them in the service of the employer" (Pet. App. 17a). Accordingly, petitioner Barrentine and another ABF driver, J.N. Scates,[2] filed grievances claiming a right to back wages

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[1]Upon arriving at the terminal to begin a trip, an ABF driver "punches in" on a time clock, picks up a manifest for the trip and performs certain preliminary office functions, for which he is paid at non-driving time rates. After he completes the preliminary work, he "punches out," locates his vehicle and makes the required pre-trip safety inspection of it. If he finds no defects, he proceeds on his trip, in which case he is paid at the driving time rate for all time spent driving. If, however, the driver discovers a defect, he is required to take the vehicle to a repair facility, which is owned by ABF and located on its premises, where the driver "punches in" on a second clock. In that case, the driver is not paid for the time between his "punch-out" and his second "punch-in;" his paid time recommences with the time spent on repairs (Pet. App. 18a).

[2]Although Scates was initially a plaintiff in this action, he recently was elected an officer of Local 878 and has filed a motion with the district court for leave to withdraw. He is not, therefore, a petitioner in this action.

under the terms of the collective bargaining agreement (*e.g.*, R. 51-52, 81).[3] The joint labor-management committee that heard the grievances denied recovery under the contract.

2. The two grievants and six other ABF drivers[4] thereupon filed the complaint in this case, alleging a violation of the Fair Labor Standards Act by ABF and a breach of the duty of fair representation by the Union and its president, respondent A.J. Pickering.[5] The district

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[3]"R." references are to the record in the district court.

[4]Petitioner Barrentine and Scates were joined in this action by petitioners Edwards, Keeney, Blanton, Robinson, Deaton, Mitchell and Young. Prior to trial, the complaint was dismissed with prejudice as to petitioners Robinson, Young and Edwards on the ground of their failure to answer interrogatories.

Although only petitioner Barrentine and Scates had filed grievances, the district court rejected the defense claim that the other employees could not proceed in the case since they had not exhausted their contractual remedies. The district judge explained that it would have been a futile gesture for the remaining employees to have filed grievances and gone to arbitration in light of their knowledge of the action that the grievance committee had taken in the cases of Barrentine and Scates. Accordingly, he "treat[ed] the case as though each of the named plaintiffs had actually filed grievances which were considered and denied" (Pet. App. 6a). In neither of the courts below did petitioners object to that approach (Pet. App. 26a).

[5]Respondent ABF asserts (Br. 6-8) that petitioners did not file written consents authorizing suit, as required by 29 U.S.C. 216(b), and that therefore their FLSA claims are barred. The filing of consents is not a jurisdictional requirement, but serves only to stop the running of the statute of limitations in "collective or class actions" (29 U.S.C. 256). The complaint in this case initially sought relief on behalf of named plaintiffs and others similarly situated, but the claims on behalf of the similarly situated employees were dismissed prior to trial (Pet. App. 15a n.1). Two courts of appeals have held that where, as in this case, a case is tried as one brought on behalf of named individuals, consents are unnecessary. *Morelock* v. *NCR Corp.*, 586 F. 2d 1096, 1103 (6th Cir. 1978); *Gray* v. *Swanney-McDonald, Inc.*, 436 F. 2d 652, 655 (9th Cir.), cert. denied, 402 U.S. 995 (1971); see H.R. Rep. No. 327, 80th Cong., 1st Sess. 13 (1947). But see *Burrell* v. *La Follette Coach Lines*, 97 F. Supp. 279 (E.D.

court found (Pet. App. 4a) that the collective bargaining agreement, read literally, would require compensation for the time in question since the employees' actions were taken in the interest of the employer. Nevertheless, the court held against the employees on the fair representation claim, finding (Pet. App. 8a-9a) that although there probably was a "side deal" between the union and ABF, it was not improper because the parties could by agreement "fill in the gaps" in the collective bargaining agreement, and holding (Pet. App. 9a) that even if there were an improper side deal, it had no effect on the grievance decisions. The district court dismissed the entire action without discussing the FLSA claim.

3. On appeal, the court of appeals agreed that the employees' actions were taken in the interest of the employer (Pet. App. 21a), but affirmed the district court's findings on the fair representation issue (Pet. App. 28a-30a).[6] It also affirmed the dismissal of petitioners' FLSA claims on the ground that they were barred by the prior grievance proceedings. The court distinguished *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), on the ground that the matter taken to arbitration in that case involved race discrimination and "the right of an employee to be free from such discrimination may well be thought to

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Tenn. 1951); *Armstrong* v. *Rubin*, 31 A.D.2d 913, 298 N.Y.S.2d 325 (1969). Even if petitioners were required to file consents, the signatures on the answers to interrogatories of those petitioners whose cases proceeded to trial satisfied the requirement. *Gray* v. *Swanney-McDonald, Inc.*, *supra*, 436 F. 2d at 655. At most, the consent issue would affect the period for which petitioners could recover back wages, since petitioners have alleged a continuing violation of the Act (R.1).

[6]Petitioners are not seeking this Court's review of the court of appeals' rejection of their fair representation claim.

stand in more need of protection than conventional arbitration of a simple wage dispute may provide" (Pet. App. 25a).

Judge Heaney dissented, stating (Pet. App. 30a-31a):

> the Supreme Court's conclusions in *Alexander* v. *Gardner-Denver Co.* * * * apply with equal force to claims arising under FLSA; an employee's FLSA claim is not precluded by prior submission of his claim to arbitration under a collective bargaining agreement, unless the parties clearly and specifically consented to have the FLSA claim decided by the arbiters[,]

and noting (Pet. App. 31a) that:

> [i]n this case, there was no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration.

DISCUSSION

Because of the importance of the question presented in this case[7] to the enforcement of the Fair Labor Standards Act, and because the decision of the court of appeals represents a growing line of authority that conflicts with

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[7]Contrary to petitioners' suggestion (Pet. 12-13), this case does not present the question whether an employee who filed no grievance could be barred from instituting an FLSA action, since the non-grievant petitioners have never objected to the district court's treatment of their cases as identical to those of petitioner Barrentine and Scates, who did file grievances (see note 4, *supra*).

Nor does this case raise the question whether the Secretary has a right to institute an FLSA action based on the same facts that gave rise to an employee's submission to a grievance committee of a contractual claim (contrary to petitioners' suggestion at Pet. 14-15). In any event, that question must be answered in the affirmative. See *Marshall* v. *N.L. Industries, Inc.*, No. 78-2289 (7th Cir. Apr. 7, 1980).

this Court's decisions in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590 (1944), and *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945), the United States submits that the decision below warrants review by this Court.

1. In *Alexander* v. *Gardner-Denver Co., supra*, this Court held that an employee's submission of a grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement did not preclude his statutory right to a trial de novo under Title VII. In so holding, the Court emphasized the following features of Title VII: that an employee's rights under that statute may not be waived (415 U.S. at 51-52); that final responsibility for enforcing the statute is vested in the courts (*id.* at 44-45); that the private right of action is an essential means of obtaining judicial enforcement of Title VII (*id.* at 45); that there is no suggestion in the statute that a prior arbitral decision forecloses an individual's right to sue (*id.* at 47); and that Title VII provides for consideration of employment discrimination claims in several forums and permits individuals to pursue independently rights under both Title VII and other applicable state and federal statutes (*id.* at 47-48).

The critical features of Title VII that this Court relied on to hold that an employee does not forfeit his private cause of action thereunder if he first pursues his grievance to final arbitration also inhere in the FLSA. It, like Title VII, is a remedial statute guaranteeing to employees nonwaivable rights (*Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945)). The ultimate authority for enforcing the Act is vested in the courts (29 U.S.C. 216, 217), and the private right of action is an essential means of obtaining that enforcement (29 U.S.C. 216(b)). The FLSA provides for the consideration of wage claims in both state and

federal forums (29 U.S.C. 216) and expressly preserves other federal and state laws establishing minimum wages or maximum hours (29 U.S.C. 218). Nor is there any suggestion in the Act that a prior arbitral decision forecloses an individual's right to sue or divests federal courts of jurisdiction.

Most importantly, under the FLSA, as under Title VII (see *Alexander* v. *Gardner-Denver, supra*, 415 U.S. at 49-51), an employee is asserting a statutory right independent of and distinct from any right that he may have under a contractual bargaining agreement and that he may submit to arbitration. As this Court stated in *Gardner-Denver, id.* at 53, it is not the function of an arbitrator to protect rights guaranteed by statute; his task is limited to construing the collective bargaining agreement so as to effectuate the intent of the parties thereto. Indeed, "[i]f an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." *Ibid.*, quoting *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

An arbitrator thus is not concerned with the legality *under the FLSA* of a challenged pay practice, but only with its consistency with the provisions of the applicable collective bargaining agreement. Yet, under the decision of the court of appeals, the ruling of a grievance committee *that did not even purport to resolve the FLSA claim and to which the FLSA claim was not even submitted* precludes the employee from exercising his statutory right of judicial consideration of his FLSA

claim.[8] The result is that, as happened in the present case, an apparent violation of the FLSA will remain uncorrected and the merits of the FLSA claim will never be considered.

The alternative left to the employee by the Eighth Circuit is to eschew the grievance procedure in favor of bringing suit based on his FLSA claim. That result, however, encourages litigation at the expense of "the federal policy favoring arbitration of labor disputes." 415 U.S. at 59. Moreover, such a result conflicts with this Court's statement in *Gardner-Denver* (*id.* at 52) that "a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination."

The court of appeals distinguished *Alexander* v. *Gardner-Denver* on the ground that an employee's claim of racial discrimination needs greater protection than does a "simple wage claim" (Pet. App. 24a-25a).[9] But the FLSA, like Title VII, is "remedial and humanitarian in purpose." *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda*

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[8]Respondent ABF asserts (Br. 3-4, 5, 16) that petitioners did, in fact, submit their FLSA claims to the grievance committee. However, neither the grievances submitted to the committee nor the committee reports thereon (R. 43-54, 77-81) even mention the FLSA claim. The statement in petitioner Barrentine's "member grievance report" (R. 52) that "Federal Wage Laws also state that this is compensable time" is the only mention of federal law in the record of the grievance proceeding. No statute or judicial decision is cited. This cannot reasonably be construed as submitting an FLSA claim to the grievance committee. In sum, as Judge Heaney stated in his dissent (Pet. App. 31a), "there was no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration." There is nothing to the contrary in either the district court's or the court of appeals' opinion.

[9]This Court's holding in *Gardner-Denver* presumably extends to all Title VII claims, regardless of whether the alleged discrimination is based on race, color, religion, sex or national origin.

Local No. 123, 321 U.S. 590, 597 (1944). It was enacted to eliminate those "labor conditions detrimental to a minimum standard of living required for the general well-being of workers" by paying a minimum wage and a premium rate for overtime work so that employees would receive " '[a] fair day's pay for a fair day's work' " and be protected from "the evil of 'overwork' as well as 'underpay'." *Overnight Motor Co.* v. *Missel,* 316 U.S. 572, 576, 578 (1942). See also *Mitchell* v. *DeMario Jewelry,* 361 U.S. 288, 292 (1960); *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 706-707 (1945). Accordingly, its provisions, like those of Title VII, should be construed to accomplish the Act's important purposes.

The court below followed the Tenth Circuit's holding in *Satterwhite* v. *United Parcel Service, Inc.,* 496 F. 2d 448, 452, cert. denied, 419 U.S. 1079 (1974), that "when a wage dispute is submitted to arbitration in accordance with a collective-bargaining agreement, the employees may not thereafter maintain an FLSA §16(b) suit for recovery on the basis of the same factual occurrence as that presented to the arbitrator."[10] The First Circuit has also relied on *Satterwhite,* holding that an unfavorable arbitral decision precluded a subsequent action based on an administrative regulation of the Minimum Wage Board of Puerto Rico. *Union de Tronquistas de Puerto Rico, Local 901* v. *Flag-*

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[10] *Satterwhite,* in which the government did not participate, involved allegations that the employer's refusal to pay for time included in a lunch break, which previously had been designated as paid coffee breaks, violated the overtime provisions of the FLSA. The employer opposed the employees' petition for a writ of certiorari on the ground, *inter alia,* that the employees unquestionably had not worked more than 40 hours per week. In contrast, in the present case it is undisputed that petitioners put in time inspecting their vehicles and driving them to ABF's repair facility, for which they were not compensated; and both courts below found that those actions were taken in the interest of ABF.

ship Hotel Corporation, 554 F. 2d 8 (1977).[11] The decision below thus is not an isolated aberration from this Court's decision in *Gardner-Denver,* but, rather, represents a growing line of authority that conflicts with that decision and, if permitted to stand, will present serious problems for the effective enforcement of the FLSA.

2. The foregoing decisions also conflict with this Court's decisions in *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123,* 321 U.S. 590 (1944), and *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697 (1945). In *Tennessee Coal,* the Court made clear (321 U.S. at 602-603) that a collective bargaining agreement's condonation of an employer's practice of compensating an employee for less than all of his time does not preclude that practice from constituting a violation of the FLSA. Similarly, in *Brooklyn Savings Bank,* the Court held that waivers of wage rights guaranteed by the FLSA are illegal and without effect because they would nullify the FLSA's purpose to protect employees from "sub-standard wages and excessive hours which endangered the national health and well-being * * *" (324 U.S. at 706).

As discussed above, however, the decision of the court of appeals results in an employee's FLSA claim being foreclosed by a ruling of an arbitrator or grievance committee applying only the terms of the collective bargaining agreement. Thus, under the decision below, a pay practice violative of the FLSA would be immune from suit by the affected employees to enforce their statutory rights so long as the arbitrator or grievance committee found it to be in conformity with the

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[11] In *Union de Tronquistas,* unlike the present case (see note 8, *supra*), the employees' claim under the administrative regulation was submitted to the arbitrator (554 F. 2d at 9-10) and expressly decided by him (*id.* at 10).

applicable bargaining agreement. Such a result is in direct contravention of this Court's mandate that the terms of a collective bargaining agreement cannot shield an employer from liability under the FLSA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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